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IN THE

Supreme Court of the United States

October Term, 1962

No. 346

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners,

—vs.—

FANORIOS PANTELOGLOU, *et al.*,

Respondents.

RESPONDENTS' OPPOSING BRIEF

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32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

INDEX

	PAGE
Statement	1
No Federal or Other Question Worthy of Review Appears Herein	5
Conclusion	10

CITATIONS

Cases

Koufoupantelis, et al. v. Cia de Nav. San George, S.A., et al., 291 Fed. 2d 709	3, 5, 6, 8, 9
Cia de Nav. San George, S.A. v. Koufoupantelis, et al., 368 U. S. 895 (1961)	2, 3, 5
Isthmian Steamship & Co. v. California Spray-Chemical Corp., 300 F. 2d 41 (C. A. 9, 1962)	8
N. L. R. B. v. Piqua Munising Wood Products Company, 109 F. 2d 552	7
Panteloglou, et al. v. Cia de Nav. San George, S.A., et al., 303 F. 2d 641	1

STATUTE

Section 794, New York Civil Practice Act	1, 5, 7, 10

CONSTITUTIONAL AMENDMENT

Fifth Amendment	2, 5

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Statement

The petition herein seeks the review of a decision of the Second Circuit dated June 6, 1962 (1a) and reported as *Panteloglou, et al.* v. *Cia de Nav. San George, S.A., et al.*, 303 F. 2d 641.

Said decision affirmed the holding of District Judge Lloyd F. MacMahon (7a-12a, record below) dated March 20, 1961 (not June 13, 1961 as stated at 7a, record below) that these petitioners had fraudulently despoiled the corporate debtor, CIA DE NAV. SAN GEORGE, S.A., of all of its assets, at a time when the latter was already indebted to respondents. Pursuant to Section 794 of the New York Civil Practice Act (18a) petitioners were directed to pay

over to respondents sufficient of such assets to satisfy the latter's judgments against the said debtor.

Discovery of the petitioners' looting of the debtors' property was made for the most part through extensive examinations of the books of account of Cargo & Tank Ship Management Co., petitioners' ships' agent and no contention is made herein by petitioners that they did not so receive the debtor's property. As a matter of fact, this evidence was before this Court in a similar case, *Cia de Nav. San George, S.A.* v. *Koufoupantelis, et al.*, 368 U. S. 895 (1961) when the same petitioners unsuccessfully sought review of a similar order obtained by other respondents upon the same evidence.

In this earlier case, as here, there was no claim that petitioners had not divested the debtor of $1,800,000.00 without consideration therefor and at a time when the debtor was indebted to respondents.

In the instant case, petitioners similarly do not deny that all of the debtor's assets were so rifled by them, but attempt to find a basis for certiorari other than that rejected in *Koufoupantelis, supra*, by raising an alleged violation of the due process provisions of the Fifth Amendment. This purported invasion of the petitioners' rights is claimed to arise from the fact that respondents have relied on the same evidence presented in *Koufoupantelis* and have failed to establish anew the self-same facts developed by the examinations and testimony in *Koufoupantelis*.

Thus, petitioners contend that it was improper for the Court below to affirm the District Court's judgment without requiring respondents to prove all over again that

the same $1,800,000.00 had been fraudulently transferred from the debtor to petitioners and that the same had not been repaid by petitioners. It is noteworthy in this regard that not an iota of proof was proffered by petitioners, either in the District Court, the Court of Appeals or in their petition herein, in support of this contention.

All that appears is the naked affirmation that six months elapsed between the filing of the supersedeas bond in the *Koufoupantelis* appeal and the date supplementary proceedings were instituted by respondents against petitioners in the instant case. Petitioners' position is that during this period of approximately six months (petition p. 7) they "were relieved of all restraints with respect to any moneys of the judgment debtor which might have been under their control . . . ." However, there is no claim made, as indeed there could not properly be, that petitioners were relieved of the obligation to repay the funds which they had improperly taken from the judgment debtor. Supersedeas bonds are effective to stay execution upon judgments appealed from, but they do not cancel or satisfy any outstanding obligations merely by reason of their being filed. Nor, did such bond affect the obligation of petitioners to these respondents where such bond was filed in the *Koufoupantelis* case.

In the *Koufoupantelis* appeal at p. 714 of 291 Fed. 2d, the Court of Appeals stated of these same petitioners:

> "As the third parties have failed to make any explanation of the facts alleged by the plaintiffs we treated those facts as if they were true."

So too, here, a concise statement of the petitioners' failure to meet their burden of proof throughout appears in

the opinion of Judge MacMahon in the District Court (p. 10a, record below):

> "The third parties have not shown, and indeed do not even claim, that the judgment debtor received any consideration whatever for the transfers to them. Rather, they vaguely explain the July 24 transfer as an 'auditor's adjustment' necessitated by a balancing of mutual accounts maintained by Cargo & Tankship for the 'Santa' group of vessels.
>
> * * * * *
>
> "[11a] A mere recitation of the facts garnered from Cargo & Tankship's records impels the conclusion that the transfer to the third parties was fraudulent."

Again, the Court of Appeals in its opinion herein stated (7a):

> "They [petitioners] have shown nothing to indicate that their prior indebtedness does not continue to exist. Section 794 requires them to produce facts, not to indulge in speculations, to support their theory that they are not indebted to the defendant."

As the Court below stated:

> "The plain fact remains that on January 1st, 1959, the judgment debtor had an ocean-going vessel; that on January 4th, 1959, it had over $800,000.00 in cash; that in April and June of 1959, the judgments involved here were entered against the debtor; that until July 23, it was credited with $1,800,000.00 on Cargo & Tankship's books; and that on July 24, 1959, it had neither vessel, cash, nor credit.
>
> Since the ship-owning third parties presented no evidence to the contrary, the court below was cor-

rect in concluding that they were indebted to Cia De Nav. San George, S.A."

It is clear the petitioners failed to meet their obligation under said Section 794 to "show such facts as may be deemed by the Court sufficient to entitle the said * * * third party to a trial of the issues * * *". Such failure or inability to come forward with evidentiary facts further sustained the decisions of the Courts below. The alleged violation of the Fifth Amendment is without substance and merely intended to delay the enforcement of respondents' rights.

No Federal or Other Question Worthy of Review Appears Herein

With respect to the merits of the instant petition, it may be noted that the identical evidence herein has been passed upon by District Judge Palmieri (Docket No. 335, October Term, 1961, pp. 1a-5a) in *Kaufoupantelis*, as well as by the Court of Appeals in the latter case, 291 F. 2d 709; by District Judge McMahon (7a-12a record below) in the present case and the decision below (1a-8a), 303 F. 2d 641.

In each of these instances, the Court found that the creditors had proved facts sufficient to meet the requirements of said Section 794 (18a) but that these same petitioners had failed to " . . . show such facts as may be deemed by the Court sufficient to entitle the said judgment debtor or a third-party to a trial of the issues" in a plenary action.

Making no claim, even hereon, that there is evidence extant contravening the facts found by all the other Courts, and the petition herein expressly stating (p. 7) that a "factual question . . . was resolved . . ." by the District Court, petitioners now allege that the evidence herein was

defective for the simple reason that it was the identical proof proffered in *Koufoupantelis* rather than the same facts established anew in the instant case (p. 7).

This argument, at best, relates to a trivial question of evidence and certainly does not attain to the dignity of a federal question or a constitutional violation worthy of review.

While the label of unconstitutionality is pinned by petitioners to the Courts' action below because the factual question was decided adversely to petitioners, no claim is presented that the New York statute itself is unconstitutional. Petitioners rather argue that the Court below erroneously indulged in a so-called presumption of continuance (p. 8) " . . . to the effect that a state of facts shown to exist in the fall of 1959 must necessarily also have existed on September 26, 1960, in the absence of proof to the contrary".

Indulgence in such a formal presumption is not reflected in either the opinions of Judge McMahon or of the Court of Appeals. This charge, if true, is at worst merely one that the Court pursued ordinary logic in finding that a fact proven to exist yesterday will be believed to exist today in the absence of proof to the contrary.

Lest there be a mistaken interpretation gathered from the petition relative to this argument that the determination below "rested solely upon evidence which had grown stale with the passage of time . . ." (p. 9), it should be noted that petitioners do not contend that the proofs and evidence were not assembled in new affidavits and exhibits in the within case and presented to Judge McMahon in open Court on November 22, 1960 (p. 3a record below, reciting

the moving papers). Petitioners' argument rests solely on the claim that the facts proven in *Koufoupantelis* were also presented to the Court below.

There is no legal substantiation in the petition by cited precedents, or otherwise, that in the absence of repayment or replacement the debtor's assets taken on July 24, 1959 (7a) (and still admitted to be withheld on April 1st, 1960 [p. 7]), did not continue to be withheld on November 22nd, 1960, when the original motion was argued before Judge MacMahon (p. 3a record below).

Nor is it material hereon whether or not the Courts below relied on a legal presumption in concluding that petitioners were liable under the provisions of said Section 794. The authorities which are cited by petitioners at p. 8 of the petition do not establish error, but, in fact, support the findings below. They merely emphasize the propriety of the findings that petitioners did not or could not produce evidentiary material to meet their burden within the framework of Section 794.

Petitioners cite *N. L. R. B.* v. *Piqua Munising Wood Products Company*, 109 F. 2d 552, 554, for the alleged authority that an indulgence in such presumption was erroneous and presume to quote from that decision. However, the mere perusal of the quoted portion in full indicates that the Court *held there that the question of continuation* of membership in a union was one of fact and was to be "decided upon *in the light of the facts and circumstances* before" the Board (Italics ours).

The full sentence quoted only in part by petitioners reads: "It is a well-established rule of evidence that when the existence of a personal relationship or state of things, is

once established by *proof*, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter". (italics ours)

Here, too, the rule is clearly stated to require that "the contrary is shown" by petitioners' adducing *facts*, not speculative conclusions, to support their arguments.

So, also, in *Isthmian Steamship & Co.* v. *California Spray-Chemical Corp.*, 300 F. 2d 41, 49 (C. A. 9, 1962), the Court recently treated with a similar argument. The Court stated:

> "Since the shipper was originally the owner of the cargo and *since nothing was put in evidence to change that fact* it could be assumed (in fact we must assume)—in support of the judgment—that the shipper was still the owner of the cargo. Appellant had not proved otherwise, and it certainly had not established any ground for invoking § 1739 (4) in support of its position". (Italics ours).

In this latter case, the Court assumed in 1962 that ownership proved as of 1952 remained the same, absent other proof. Also, in the latter situation supersedeas bonds had been posted pending determination of the appeal but, of course, the same could not and did not affect in any way the question before the Court. Nor did the passage of time render the evidence "stale".

It is further contended by petitioners that the supersedeas bond posted in *Koufoupantelis* effected some kind of mysterious hiatus in the obligation of petitioners to replace or repay the assets of which they stripped the judgment debtor. This is somehow related by petitioners to the supplementary proceedings instituted *sub judice* and is

claimed by them to have obviated the need for these petitioners to repay their debt to the judgment debtor. Obviously, while the *Koufoupantelis* subpoenas created a stay restraining the third-party petitioners from disposing of the debtor's assets in that case, and while the supersedeas bond in *Koufoupantelis* stayed the execution by the judgment creditors of their judgments against petitioners therein, neither constituted a satisfaction of such indebtedness. As a matter of fact, even when the *Koufoupantelis* judgment was paid in 1961 after certiorari was denied by this Court, the petitioners' obligation to the judgment debtor was satisfied only to the extent of such payment, and the balance of more than $1,000,000. was, and still is, due to the debtor from these same petitioners. Certainly, no supersedeas bond has affected or modified in any way, this remaining obligation.

Clearly, if petitioners' argument that no indebtedness existed, by reason of their misappropriation of the debtor's assets, after the supersedeas bond had been posted in *Koufoupantelis* were valid, there would have been no reason for the payment by petitioners of the judgments obtained in the *Koufoupantelis* cases based upon the existence of petitioners' obligations to said debtor.

On p. 11 of the petition it is claimed that there is a "lack of pertinent evidence before the Court" which "established the existence of an issue of fact".

There is no attempt there, or anywhere else in the petition or in the record below to show or prove such alleged paucity of evidence. Obviously, if such lack existed it would appear from the moving papers, affidavits and exhibits presented to Judge MacMahon by the respondents.

The order entered by Judge MacMahon upon such motion (p. 3a record below) recites these affidavits and exhibits and both the opinions below discuss at length the evidence adduced by respondents, but petitioners have not even troubled to print for the Court or to submit the aforesaid supporting papers.

CONCLUSION

There has been no showing made by petitioners of any error whatsoever herein, no basis for an alleged review grounded upon any violation of the Fifth Amendment or any reason in this case for an interpretation of the scope of the Court's authority under Section 794 of the New York Civil Practice Act. It is therefore respectfully prayed that the petition for a writ of certiorari be denied in all respects.

Respectfully Submitted,

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